IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 27TH MAY 2005 / 6TH JYAISHTA 1927

Crl.Rev.Pet.No. 954 of 1996(C)

CRA.24/1996 of SESSIONS COURT, KASARAGOD
CC.29/1991 of CHIEF JUDICIAL MAGISTRATE, KASARAGOD

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REVN. PETITIONER:

ANANDAN, S/O.IYTHA, RESIDING AT PATHRAMPALLAM,
ARIKKADY, KASARAGOD TALUK.

BY ADV. SRI.M.R.RAJENDRAN NAIR

RESPONDENTS:

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULM.

BY PUBLIC PROSECUTOR SRI.K.THAVAMONY

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 27/05/2005, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. HEMA, J.

CRl.R.P.No.954 OF 1996

Dated this the 27th day of May, 2005

O R D E R

The question to be considered in this case is whether the petitioner is entitled for benefit under Section 197 Cr.P.C. or not.

2. The petitioner is an Extra Departmental Delivery Agent in Bombrana Post Office. According to the prosecution, while he was working in that capacity he was entrusted with Money Orders for Rs.1,000/- each sent by PW9 from Bombay to his mother PW4. But the said amount was misappropriated by the petitioner without paying it to PW4 and also by forging the Money Order receipts. PW9, on coming to know of this from PW7, his sister, that his mother had not received the money order or the letters sent by him (letters are Exhibits P10 and P11), he lodged a complaint Exhibit P12 before the Superintendent of Police. It was forwarded to the local police and a crime was registered. After investigation a final report was filed against the petitioner, based on which cognizance was taken by the Chief Judicial Magistrate under Sections 409 and 465 IPC.

3. After trial, the trial court convicted and sentenced the petitioner to undergo simple imprisonment for six months and to pay a fine of Rs.500/- and in default to undergo simple imprisonment for two months under Section 409 IPC. He is also sentenced to undergo simple imprisonment for four months under Section 465 IPC. Both sentences were ordered to run concurrently. This order was passed on 22.10.1994 in C.C.No.29 of 1991. It was challenged in appeal before the Session's Court in Criminal Appeal No.70 of 1994 and the court set aside the conviction and sentence and remanded the case to the trial court for fresh disposal after giving opportunity to both sides to adduce

further evidence as directed in the judgment.

4. Thereafter, the trial court, after complying with the directions of Session's Court again found the accused to be guilty and petitioner was sentenced to undergo simple imprisonment for five years and to pay a fine of Rs.2,000/- and in default to undergo three months for offence under Section 409 IPC and also to undergo simple imprisonment for one year for offence under Section 465 IPC. The substantive sentences were directed to run concurrently. It was again taken up before the Session's Court and as per judgment dated 31.8.1996 in Criminal Appeal No.24 of 1996, lower appellate court confirmed the conviction, but modified the sentence. The petitioner was sentenced to undergo rigorous imprisonment for one year under Section 409 IPC and to pay a fine of Rs.10,000/-, in default of which to undergo imprisonment for six months under Section 465 IPC. Both the sentences were to run concurrently. The said conviction and sentence are challenged in this revision.

5. Learned counsel for the petitioner challenges the conviction mainly on the ground that the prosecution is bad for sanction under Section 197 Cr.P.C. According to him, no court can take cognizance of offence under Sections 409 and 465 IPC against the petitioner, who is an Extra Departmental Delivery Agent working in the Postal Department, without previous sanction of the Government. Admittedly no sanction is produced in this case and hence it was strenuously contended that the petitioner deserves an acquittal.

6. The fact that the petitioner is an Extra Departmental Delivery Agent is not under dispute. It is established by evidence also. Learned counsel for the petitioner also would admit that the petitioner, who is an Extra Departmental Delivery Agent is governed by the Extra Departmental Agents Conduct and Service Rules ('Rules' for short). As per Rule 3 of the Rules, the appointing authority in respect of each

category of employees shall be, as shown in the schedule annexed to the rules. As per the relevant annexure, the appointing authority of the Extra Departmental Delivery Agent is the Assistant Superintendent of Post Offices. Rule 7 refers to the nature of penalties and it is laid down that an appointing authority is entitled to order a punishment removing the employee from service and also dismissing from service. There is nothing stated in Rule 7 of the Rules that sanction of the Government is necessary for passing such penalty.

7. That apart, the schedule also does not reveal that all Extra Departmental Delivery Agents require sanction for removal or dismissal of employee from service. It is quite evident that petitioner is an Extra Departmental Delivery Agent whose appointing authority is Assistant Superintendent of Post. He can be removed or dismissed from service by such authority himself as per Rule 3 read with Schedule to the Rules and also Rule 7, without sanction of the Government. Nothing in the Rules will show that Extra Departmental Delivery Agent is not removable from service except with sanction of the Government or "save by or with sanction of the Government".

8. A reading of Section 197 Cr.P.C. will go to show that in case of a public servant who is "not removal from his office save by or with the sanction of the Government" is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Government. If the employee is a State Government employee, sanction from the State Government will be required in such cases. In this case, the Rules referred above will show that the petitioner who is an Extra Departmental Delivery Agent is removable from service, save by or with the sanction of the Government and therefore, the benefit of Section 197 Cr.P.C. cannot be

extended to him. Admittedly, the petitioner is a public servant. Since the petitioner was not able to establish that he is a public servant not removal from his office save by or with the sanction of the Government, no previous sanction is necessary under Section 197 Cr.P.C. to take cognizance of offence alleged against him.

9. Further, learned counsel for the petitioner referred to a decision reported in ***Superintendent of Post Offices v. P.K. Rajamma*** **((1997) 3 SCC 94)** and argued that Extra Departmental Postal Agents are employees under the Union of India holding civil post. The Honourable Supreme Court, referring to the Posts & Telegraphs Extra Departmental Agents (Conduct and Service) Rules, 1964 found that the said Rules are issued under the authority of the Government of India and therefore, the Extra Departmental Delivery Agent is an employee holding a civil post under the Union of India. Since petitioner is holding a civil post as held by the Supreme Court, it was contended that by virtue of Article 310 of the Constitution of India, a person who is holding a civil post under the Union holds offence "during the pleasure of the President".

10. A reference was also made to Rule 16A of the Rules to contend that the President may either on his own motion or otherwise, review an order passed under this Rule in respect of imposing penalty. Rule 16A provides for powers of the President to review an order passed under the Rules. The President may at any time either on his motion or otherwise review an order passed under these rules, when any new material or evidence which could not be produced or was not available at the time of passing the order under review and which has the effect of changing the nature of the case, has come, or has been brought to his notice. Therefore, the contention raised is that petitioner is holding a civil post and a person who holds a civil post under the Union can be

taken as a person who can work under the will and pleasure of the President and the order passed by the appointing authority can be taken as being final only after the President refuses the same under Rule 16A of the Rules. In this sense, it was argued that petitioner has to be taken as public servant who is not removable from service, save by or except with sanction of the Government. In this case the petitioner who is an employee in the Postal Department can be treated as one removable only with sanction of the Government, it is argued.

11. On considering the scope of Article 310 of the Constitution of India and Rule 16A of the Rules, I cannot agree with the argument advanced. It is true that as laid down by the Supreme Court in the decision cited above, petitioner is a person holding a civil post. But under no rule, petitioner can be said to be not removable except with the sanction of the Government. The petitioner can be removed by the appointing authority himself, and no sanction is required for removal of the person. Therefore, the argument advanced as above cannot be accepted. I am satisfied that the courts below have considered the aspects in right perspective and no interference is called for.

12. It is also to be noted that the learned Session's Judge placed reliance upon the decision of this Court reported in ***State of Kerala v. Retnamma*** **(1987(2) KLT 952)** wherein referring to an employee who was working as a Postal Assistant in the Savings Bank section of a Post Office held "admittedly the accused was permanent public servant not removal from office except by or with the sanction of the Government". Learned counsel for the petitioner submitted that no previous sanction is required and Section 197 Cr.P.C. does not contemplate such previous sanction and therefore, the decisions on the point are not of any help the point to be considered in this case. The

learned counsel submitted that if a public servant is found to be one not removable from his office save by or with sanction from the Government, he will be entitled to protection under Section 197 Cr.P.C. In this case in view of Rule 16-A of the Rules read with Article 310 of the Constitution of India, the contention raised is that the petitioner who holds a civil post is to be considered as a person who cannot be removed save by or except with sanction of the Government.

13. Learned counsel for the petitioner also submitted that a sanction means solemn confirmation or ratification given by a supreme authority or an express authoritative permission or recognition or something which serves to support, authorise, or confirm an action, procedure, etc., referring to the meaning of the word 'sanction' in various dictionaries. It will appear from the meaning of the word 'sanction', that it means something which serves to support or confirm an action, procedure, etc. But in this case no sanction is required and no confirmation is required by the President as argued on behalf of the petitioner, to confirm his removal or dismissal. The powers of the President is only the powers to review. It cannot be treated as sanction. Sanction is different from invoking powers of review and interfering in an order passed by a competent authority. Sanction cannot be meant to be a power to review under Rule 16-A of the Rules.

14. Learned counsel for petitioner also submitted that as per the prosecution case, petitioner forged a signature purporting to be that of PW9 in the receipt for having received the Money Order. The prosecution has not taken any step to prove that the said document does not contain the signature of PW9. According to petitioner, he had taken money to PW1, and he was not permitted to go inside the house. But, he handed over the receipt to be signed by PW1 and it was attested by none other than PW1's daughter. In the absence of evidence of

PW1's daughter, it cannot be said that signature in the receipt is a forged one, it is argued. It is true that PW1's daughter is not examined nor questioned.

15. The petitioner took up a stand at the time of questioning that he had received the amount from the Post Office and handed over the same to PW1. According to him, he is a member of the Scheduled Caste who is not having access to the house of PW1. He was, therefore, constrained to send the money and get the slip acknowledged through a boy in the house of PW1. Acknowledgment-slip was taken inside and was brought out and handed over to the accused. According to petitioner, he had not misappropriated the amount or created any forged document. He had not failed to pay the money. In the light of the defence version it was submitted that the examination of the witness who attested the signature of the recipient of the Money Order, PW1, was inevitable and in the absence of the same, a doubt is created in respect of the alleged forgery.

16. Two of the daughters of PW1 attested the signature of PW1 in the postal receipt acknowledging receipt of Money Order. Those witnesses are crucial and vital and one of them is PW1. Similarly in the second postal acknowledgment Exhibit P16(a) also, a witness is shown to have attested the left thump impression of the payee. But such attestor was also not examined and therefore it was contended that their non examination will adversely affect the prosecution.

17. Learned Session's Judge considered the above argument advanced before the appellate court. Testing the said contention as on the touchstone of available evidence and various circumstances including the extra judicial confession statement given by the petitioner to PW5, the court below held that there is no force in the contention in respect of an adverse inference to be drawn against the prosecution for

not examining the attestors. I find, absolutely no reason to reverse the said findings. It is not the mere non examination of eye witness that would tilt the balance. The mere non-examination of witness will not cast a reasonable doubt in the mind of the court with respect to the reliability of the prosecution case. In this case I do not find that the non-examination has given rise to any reasonable doubt. The prosecution case remains in tact and the court below has considered the contention raised in minute details testing the worth of the evidence from all possible angles, on sound principle of law and I do not find that such findings warrant any interference.

18. Except these points discussed above, nothing more was argued, in respect of the conviction. Learned counsel appearing for petitioner submitted that the sentence requires interference. The petitioner was aged 31 years in 1989 and he suffered much because of loss of employment. His prospective is spoiled and he is suffering from agony for a long period. It was also pointed out that the court also originally sentenced petitioner to undergo only six months imprisonment for the offences proved against petitioner. But, as the matter stands now, petitioner is to undergo imprisonment for one year. Had he not filed any appeal, it was found enough if he had undergone imprisonment for a period of six months.

19. Therefore, learned counsel for the petitioner requests for leniency to be taken in the matter. Leniency was pleaded before the trial court and appellate court also. The appellate court considered the various aspects and found that trial court correctly noted the relevant facts necessary for imposing a proper sentence. It was found that this case warrants a deterrent sentence of imprisonment. The learned Session's Judge considered the second limb of the argument that it would have been sufficient if the petitioner had undergone only six months

imprisonment if he had not filed appeal etc. The Session's Court after considering this argument found that rigorous imprisonment for one year and a fine of Rs.10000/- shall meet the ends of justice adequately and that misplaced sympathy and leniency will lead to unwholesome consequences in the society. I do not find any reason to interfere with the sentence.

20. It was also submitted that the court may think of the benevolent provision of the Probation of Offenders Act, the petitioner being the first offender. I find that this is not a fit case to invoke the provisions of the Probation of Offenders Act.

The petition is dismissed.

K.HEMA, JUDGE

vgs.

K.HEMA, J.

CRL.R.P.NO.954 OF 2003

O R D E R

27.4.2005